Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0059-20
	)	
	)	Date of Issuance: February 13, 2025
v.	)	
	)	
D.C DEPARTMENT OF	)	Senior Administrative Judge
EMPLOYMENT SERVICES,	)	JOSEPH E. LIM, ESQ.
Agency	)	
	)	

Charles Tucker, Esq., Employee Representative
Tonya Robinson, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY

On September 14, 2020, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Employment Services' ("DOES" or "Agency") decision to terminate her from her position as an Administrative Law Judge effective August 28, 2020, due to Unauthorized Absence of five workdays or more. On February 4, 2021, OEA requested Agency's response to the appeal. After OEA granted Agency's March 3, 2021, Motion for Extension of Time to File an Answer, Agency submitted its Answer to Employee's Petition for Appeal on March 30, 2021.

Following an unsuccessful attempt at mediation, this matter was assigned to Administrative Judge Arien Cannon ("AJ Cannon") on or about October 14, 2021. After a November 16, 2021, Prehearing Conference, AJ Cannon ordered Agency to submit the backpay worksheet related to Employee's previous matter before OEA.[1] He reasoned that although Employee's prior matter is under a separate matter number, the compliance issues addressed in that case had the potential to impact the instant matter. On December 20, 2021, AJ Cannon granted Agency's Motion for Extension of Time. On January 7, 2022, Agency filed proof of its compliance with Employee's 1601-0012-14C16 matter.

[1] *Employee v. Agency*, OEA Matter No. 1601-0012-14C16.

On January 24, 2022, Employee filed a Motion for a Hearing on Damages and a Motion to Strike Agency's Response. On January 24, 2022,[2] AJ Cannon held the instant matter in abeyance until he could determine if his prior Initial Decision ("ID") in the prior 1601-0012-14C16 matter has been fully complied with. On March 25, 2022, Agency filed a Motion to Close the Issue of Compliance and Response to Employee's Motion for Attorney Fees, arguing that it had fully complied with the ID and that Employee was estopped from securing additional attorney fees when she accepted the offer of judgment on January 2, 2020.

On or about October 27, 2022, the instant matter was reassigned to Senior Administrative Judge Monica Dohnji ("AJ Dohnji"). AJ Dohnji scheduled a conference for December 7, 2022, but rescheduled it for December 20, 2022. This matter was then reassigned to the undersigned Senior Administrative Judge ("AJ") on December 22, 2022.

Thereafter, on February 22, 2023, I issued an Order scheduling a Status Conference in this matter for March 6, 2023. Both parties failed to appear. On March 6, 2023, I issued a Show Cause Order to Agency for its failure to appear at the conference. I also issued a Show Cause Order to Employee for the same reason on June 6, 2023. After both parties showed cause,[3] I issued a June 26, 2023, Order scheduling a Prehearing Conference for July 18, 2023.

At the parties' request, this matter was held in abeyance while they pursued settlement talks. On October 31, 2023, I ordered the parties to submit monthly reports on the progress of their settlement discussions. Thereafter, the parties submitted progress reports on November 6, 2023, December 6, 2023, January 8, 2024, February 6, 2024, March 7, 2024, and April 8, 2024.

On May 2, 2024, I scheduled a Status Conference for May 13, 2024, but rescheduled it for June 17, 2024, at the request of the parties. At the June 17, 2024, Conference, the parties indicated that they wanted to restart settlement discussions. Although the parties agreed to another status conference to be held on July 9, 2024, Employee did not appear. I issued a Show Cause Order to Employee on July 9, 2024. After Employee showed cause on July 31, 2024, I scheduled a Status Conference for September 16, 2024.

On September 16, 2024, both parties informed the undersigned that AJ Cannon's prior ID was not at issue and that the only issue in the instant matter was Employee's August 28, 2020, termination. I then issued a Post Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Conference by December 11, 2024. On December 6, 2024, I granted Employee's request for an extension of the deadlines with the final deadline of December 19, 2024. Both parties have now submitted their written briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material issues of fact in dispute, and as such, an Evidentiary Hearing is not required. The record is closed.

JURISDICTION

OEA has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

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[2] This was misdated as 2021 instead of 2022.
[3] Agency had a change of counsel while Employee had a post office mix-up.

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

FINDINGS OF FACT[4], ANALYSIS AND CONCLUSIONS OF LAW

On March 1, 2009, DOES hired Employee as an Administrative Law Judge ("ALJ").[5] On October 18, 2013, DOES removed Employee from her position as an Administrative Law Judge.[6] On November 1, 2013, Employee appealed the termination with OEA. This was docketed as OEA Matter No. 1601-0012-14. On December 6, 2013, Agency filed its response to Employee's OEA appeal. This matter was assigned to AJ Cannon on February 13, 2015.

Meanwhile, Employee filed a lawsuit in the United States District Court for the District of Columbia ("District Court") alleging violations of the American with Disabilities Act against the District of Columbia on May 13, 2015, and amended her Complaint on January 1, 2016. After Employee accepted a settlement, the Court issued an Order and Judgment on January 3, 2020.[7]

On April 22, 2016, AJ Cannon issued an ID returning Employee to her former position and awarding her backpay as well as benefits.[8] On August 29, 2016, Agency sent via FedEx notice of return to work on September 6, 2016, to Employee. On September 6, 2016, Employee returned to work at Agency. Employee last reported to work at Agency on November 14, 2016. Between September 6, 2016, and November 14, 2016, Employee performed no substantive work as an ALJ.[9]

On March 10, 2017, Employee elected not to restore medical or other benefits for the period of 2013 to 2016.[10] On August 4, 2017, a check was issued for Employee's backpay and all qualifying leave.[11] On November 5, 2017, OEA certifies the compliance issue to the Executive Office of the Mayor.

On July 31, 2018, the Executive Officer of the Mayor (EOM) issued a decision that found Agency in substantial compliance with AJ Cannon's ID.[12] On September 18, 2018,

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[4] The following facts were obtained from the record and the parties' stipulations of facts, undisputed submissions and representations.
[5] Agency's Stipulation of Facts, Exhibit and Witness List (June 3, 2024), Exhibit A, Notice of Personnel Action. Employee is not an ALJ with the Office of Administrative Hearings but rather a "hearing officer" employed with DOES, pursuant to D.C. Official Code § 2-1831.01 (2) and (8).
[6] *Id*. Exhibit B, 2013 Termination Packet.
[7] *Id*. Exhibit C, Amended Complaint and Notice of Acceptance of Offer of Judgment and Order and Judgment.
[8] *Id*. Exhibit D, *Employee v. Agency*, OEA Matter No. 1601-0012-14 (April 22, 2016).
[9] *Id*. Exhibit E, 2017 Performance Evaluation.
[10] *Id*. Exhibit F, Restoration of Benefits Page.
[11] *Id*. Exhibit G, Check Register.
[12] *Id*. Exhibit H, EOM Decision on Compliance with OEA Order issued April 22, 2016.

Employee filed a lawsuit with the District of Columbia Superior Court ("DCSC") challenging the decision issued by EOM regarding Agency's compliance with OEA ID. On August 5, 2020, DCSC dismissed the case.[13]

On January 16, 2020, Employee, through counsel, advised DOES that she had been cleared to return to duty and inquired as to "what was needed to return."[14] DOES advised Employee that she would need a certificate of good standing from the District of Columbia Bar and documentation related to her fitness for duty with or without restrictions.[15] Pursuant to DC Code § 1-608.81, all ALJs employed with DOES must be members of the District of Columbia Bar since 2015.[16] DOES and Employee agreed that Employee would return to work on February 10, 2020.[17]

On February 3, 2020, Employee advised DOES, through her legal representative, that she would not be able to produce a note related to her fitness for duty as her medical insurance lapsed and no primary care physician would treat her.[18] DOES advised Employee that a letter from an emergency doctor would also suffice.[19]

After Employee failed to report to work from February 10, 2020, through February 28, 2020, and failed to provide the required certificate of good standing from the District of Columbia Bar, Agency charged Employee with absence without authorized leave.[20] On or about March 5, 2020, Agency sent via FedEx the proposed notice of termination that contained the cause for the proposed termination, the process to respond to the proposed termination and the designated hearing officer.[21] On May 4, 2020, after review of supporting documentation from Agency and Employee, Hearing Officer Rudy Chounoune concluded that the Agency's removal of Employee was supported by the preponderance of the evidence.[22] On or about August 14, 2020, Employee received the final decision on the proposed termination via FedEx.[23] Employee's termination was effective on August 28, 2020.[24]

Agency's Position[25]

Agency asserts that the uncontroverted facts in this matter supports its decision to remove Employee for cause from her position of ALJ for two reasons. Agency explains that Employee

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[13] *Id*. Exhibit I, Complaint filed with DC Superior Court and DC Superior Court Order.
[14] *Id*. Exhibit J, Emails Regarding Return to Work between Employee's counsel and Agency Human Resources Officer.
[15] *Id*.
[16] Agency brief in support of termination (November 4, 2024) Exhibit H.
[17] Agency's Stipulation of Facts, Exhibit and Witness List (June 3, 2024),
[18] *Id*.
[19] *Id*.
[20] Agency brief in support of termination (November 4, 2024) Exhibit J.
[21] *Id*. Exhibit C, Termination Packet. On or about March 5, 2020, Employee received the proposed notice of termination.
[22] *Id*. Exhibit D, Hearing Officer Report.
[23] *Supra*. Exhibit C, 2020 Termination Packet.
[24] *Id*.
[25] Agency brief (November 4, 2024).

was guilty of an Attendance-related offense: Unauthorized Absence of five (5) workdays or more, pursuant to District Personnel Manual ("DPM") §1605.4(f)(2). Secondly, Agency further notes that based on the publicly available records of the District of Columbia Bar, Employee is currently still not a member in good standing to be employed as an ALJ as required by law, specifically DC Code§ 1-608.81. Agency's investigation also reveals that Employee has not been in good standing with the District of Columbia Bar since February 2020.

Agency further states that its fitness for duty and DC Bar membership are not new requirements nor are they retaliatory as alleged by Employee. It points out that the Table of Illustrative Actions includes termination for a first offense of Unauthorized Absence of five workdays or more.[26] As for Employee's failure to meet the requirement of a DC Bar membership for her position, Agency asserts that based on the law and the DPM, the only appropriate penalty is termination. Therefore, it concludes that this Office should sustain Agency's termination of Employee.

Employee's Position[27]

Employee argues that Agency had mistreated and continued to mistreat her by terminating her from her position twice. She asserts that Agency did not require her to undertake a fitness for duty medical examination before nor did it require her to waiver her bar license into DC before. Employee states that if she had known that a D.C. Bar license was required, she would have obtained it.

However, Employee does not deny that she had been absent from work since February 10, 2020, the official date of her return. More importantly, Employee does not deny that she still does not have the legally required DC Bar membership to be an ALJ with Agency.

Whether Employee's actions constituted cause for discipline

Under DPM §1605.4(f)(2), the definition of "cause" includes Attendance-related offenses, including unauthorized absence. DC Code§ 1-608.81 also requires that an ALJ in the District Government must possess DC Bar membership. In this matter, Employee does not deny the facts underlying Agency's causes of action. In her brief, Employee does not offer any credible reason as to why she never came to work or why she never obtained the legally required DC Bar membership. Consequently, given the totality of the circumstances, I find that Agency had met its burden of proof for its causes of action against Employee.

Whether the penalty of removal is within the range allowed by law, rules, or regulations.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[28] According to the Court in *Stokes,*

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[26] Agency Reply Brief in Support of Termination (December 18, 2024), Exhibit C.
[27] Employee Response to Agency's Brief in Support of Termination (December 10, 2024).
[28] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical*

OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, I find that Agency has met its burden of proof for all its charges and specifications against Employee.

In reviewing Agency's decision to terminate Employee, OEA may look to the TIA. Chapter 16 of the DPM outlines the TIA for various causes of adverse actions taken against District government employees. The penalty for a first offense for Unauthorized Absence of five (5) workdays or more is removal.[29] In addition, an ALJ for Agency is required by law to possess a DC Bar membership in good standing. In light of this, I find that Employee's request to be returned to work as an ALJ for Agency despite her lack of the required Bar membership is not a reasonable request as it would violate the law.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[30] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. I find that the penalty of removal was within the range allowed by law. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE: *s/Joseph Lim*
JOSEPH E. LIM, Esq.
Senior Administrative Judge

Services, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[29] DPM §1607.2(f)(4).

[30] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).